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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 128

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Petitioner,

versus

S. O. POTTORFF, Receiver of The First National Bank of El Paso, Texas,
Respondent.

PETITION FOR REHEARING

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Dallas, Texas,
March 16, 1934.

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INDEX

	Page
Primary Grounds of Petition	1- 2
First Ground	2-15
Second and Third Grounds	15-19
Conclusion	19-20

CASES CITED

Aldrich v. Chemical National Bank, 176 U. S. 618, 44 L. ed. 611	16, 19
Blakey v. Brinson, 286 U. S. 254, 76 L. ed. 1089	18
Cathcart et al. v. Robinson, 5 Peters 264, 280, 8 L. ed. 120, 126	6
Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24, 60, 35 L. ed. 55, 60	16, 19
Citizens' Central National Bank v. Appleton, 216 U. S. 196, 54 L. ed. 443	19
Marlin v. Lewallen, 276 U. S. 58, 62-63, 72 L. ed. 467, 469	6
National Bank of Genesee v. Whitney, 103 U. S. 102, 26 L. ed. 444	15
Panama R. Co. v. Rock, 266 U. S. 209, 212-213, 69 L. ed. 250, 252	6, 14
Pullman's Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 43 L. ed. 108	16, 19
Smith v. Lansing, 22 New York 520, New York Court of Appeals Reports, Book V, p. 370	6
State Bank of Commerce of Brockport v. Stone, 184 N. E. 750	14

STATUTES

	Page
National Bank Act of 1863	4
National Bank Act of 1864 (12 U. S. C. A. § 24)	5
New York Law of 1838	4, 5
United States Statutes at Large—	
Vol. 12, p. 665	3
Vol. 12, p. 668	4
Vol. 13, p. 101	5

OTHER REFERENCES

The Congressional Globe, 37th Cong., 2d sess., pages 3258, 3362-3, appendix 23-28	3
The Congressional Globe, 37th Cong., 3d sess., pages 226, 505, 1114, appendix 25	3
Report of S. O. Pottorff, Receiver, to Comptroller of the Currency, Trust No. 1720	18

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PETITION FOR REHEARING

To the Honorable the Supreme Court of the United States:

This petition for rehearing is filed pursuant to Supreme Court Rule 33, and an order of the Court enlarging the time for filing to and including March 19, 1934.

Three primary grounds are urged in support of this petition, viz.:

1. In enacting section 8 of the National Bank Act of 1864 (12 USCA § 24), Congress adopted the language of section 18 of the New York banking law which the Court of Appeals of that State in 1860 had construed to authorize the pledging of assets as security for both public and private deposits; and in adopting that language, four years after that decision, Congress likewise adopted the construction placed upon it by that Court;

2. To authorize the ratable distribution to general creditors of both the railway company's deposits, procured by the bank as a result of the pledge agreement, and the proceeds from the sale of the pledged liberty bonds, is to enforce in favor of those creditors an agreement which the Court has condemned, contrary to its announced doctrine "that no rights arise on an *ultra vires* contract".

3. Assuming the invalidity of the pledge agreement, the railway company's deposits never became subject to ratable distribution among general creditors, but were held by the bank, and later by its receiver, as special deposits in trust, and petitioner should be permitted to recover this trust fund in its second cause of action now pending in the District Court, upon identifying such funds in their original or altered form.

First Ground

The Honorable S. P. Chase, Secretary of the Treasury during the administration of President Lincoln, was largely responsible for the passage by Congress of the National Bank Act of 1864. In his report to Congress on December 9, 1861[1], Secretary Chase advocated the passage of such an act, and stated in part:

> "It is not untried theory. In the State of New York, and in one or more of the other States, it has been subjected, in its most essential parts, to the

1 Appendix to The Congressional Globe, 37th Cong., 2d sess., pp. 23-28.

> test of experiment, and has been found practicable and useful. The probabilities of success will not be diminished, but increased, by its adoption under national sanction, and for the whole country" (p. 26).

On July 11, 1862, Congressman Hooper of Massachusetts introduced a bill (No. 568) to provide a national currency,[1] which was referred to the House Committee of Ways and Means. The House took no action on this bill, and apparently it was never reported by the Committee[2]. The Secretary of the Treasury, in his report to Congress in December 1862[3], again urged the passage of a national bank act, and during that session of Congress several bills to provide a national currency were introduced, among others one by Congressman Hooper[4], and one (S. 486) by Senator Sherman[5].

In the House debate on S. 486, which became a law on February 25, 1863[6], Congressman Spaulding of New York stated:

> "The bill in all its essential features is like the free banking law of the State of New York, which has been in successful operation in that State since 1838" (37th Cong., 3d Sess., p. 1114).

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1 The Congressional Globe, 37th Cong., 2d sess., p. 3258.
2 The Congressional Globe, 37th Cong., 2d sess., pp. 3362-3.
3 Appendix to The Congressional Globe, 37th Cong., 3d sess., p. 25.
4 The Congressional Globe, 37th Cong., 3d sess., p. 226.
5 The Congressional Globe, 37th Cong., 3d sess., p. 505.
6 United States Statutes at Large, volume 12, page 665.

For comparative purposes and the Court's convenience we set out the pertinent portions of section 18 of the New York banking law of 1838 and section 11 of the National Bank Act of 1863:

New York Law of 1838.

"§ 18. Such association shall have power to carry on the business of banking, by discounting bills, notes and other evidences of debt; by receiving deposits; by buying and selling gold and silver bullion, foreign coins and bills of exchange, in the manner specified in their articles of association for the purposes authorized by this act; by loaning money on real and personal security; and by exercising such incidental powers as shall be necessary to carry on such business; * * *" (Laws of New York, 61st Session, Chapter 260, page 249).

National Act of 1863.

"Sec. 11. *And be it further enacted,* That every association formed pursuant to the provisions of this act * * * shall have power to carry on the business of banking by obtaining and issuing circulating notes in accordance with the provisions of this act; by discounting bills, notes, and other evidences of debt; by receiving deposits; by buying and selling gold and silver bullion, foreign coins, and bills of exchange; by loaning money on real and personal security, in the manner specified in their articles of association, for the purposes authorized by this act, and by exercising such incidental powers as shall be necessary to carry on such business; * * *" (United States Statutes at Large, Chapter 58, volume 12, page 668).

For some reason not readily ascertainable from the congressional records available to petitioner, the Act of February 25, 1863 was supplanted by another National Bank Act passed by Congress and approved on June 3, 1864 (13 Stat. 99, Chap. 106). Section 8 of the Act of 1864 (12 USCA § 24, par. 7) in substantial effect was a reenactment of section 11 of the Act of 1863, and, like it, followed closely the language of section 18 of the New York banking law of 1838, as shown by the following comparison:

New York Law of 1838.

"§ 18. Such association shall have power to carry on the business of banking, by discounting bills, notes and other evidences of debt; by receiving deposits; by buying and selling gold and silver bullion, foreign coins and bills of exchange, in the manner specified in their articles of association for the purposes authorized by this act; by loaning money on real and personal security; and by exercising such incidental powers as shall be necessary to carry on such business; * * *" (Laws of New York, 61st Session, Chapter 260, page 249).

National Act of 1864.

"Sec. 8. Such association shall have power to * * * exercise under this act all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; by obtaining, issuing, and circulating notes according to the provisions of this act; * * *" (United States Statutes at Large, Chapter 106, volume 13, page 101).

From this legislative history it is clear that Congress substantially adopted the language of section 18 of the New York banking law of 1838 as section 11 of the National Bank Act of 1863 and as section 8 of the National Bank Act of 1864, and under the decisions[1] of this Court, Congress likewise adopted the construction theretofore placed upon that language by the Court of Appeals of the State of New York.

We must now ascertain what construction, if any, had been given to the language of section 18 of the New York banking law of 1838 by the Court of Appeals of New York prior to the passage by Congress of the National Bank Acts of 1863 and 1864. This inquiry brings us to the decision of that court in 1860 in *Smith v. Lansing, 22 New York 520, New York Court of Appeals Reports, Book V, page 370.* In that case the president of Oliver Lee & Co.'s bank gave his personal bonds, and later the bonds of himself and other co-sureties, to secure the deposit of certain state funds and also the deposits of the Western Savings Bank. To protect himself and his co-sureties, the president purchased certain real property with funds belonging to the bank, taking title in his own name. Subsequently the bank became insolvent and its receiver brought an action in the Superior Court of Buffalo to compel the bank's president

1 Cathcart et al v. Robinson, 5 Peters 264, 280, 8 L. ed. 120, 126; Panama R. Co. v. Rock, 266 U. S. 209, 212-213, 69 L. ed. 250, 252; Marlin v. Lewallen, 276 U. S. 58, 62-63, 72 L. ed. 467, 469.

to convey said real property unconditionally to him. This action necessarily involved a consideration of the power of the president to hold the real estate purchased with the bank's money as protection against liability on the deposit bonds, and in holding that this power existed under section 18 of the state banking law, the New York Court of Appeals stated in part:

> "The general banking law confers upon associations formed under it the powers, among other things, to carry on the business of banking, etc., by discounting bills, notes, and evidences of debt; by receiving deposits; by loaning money on real and personal security; and by exercising such incidental powers as shall be necessary to carry on such business; to choose one of their number as president, and to appoint such other officers and agents as their business may require, etc. (Laws of 1838, chap. 260, § 18.)" (22 New York 522).
>
> "Suppose, then, that this bank had been managed by a board of directors, and, at a regular meeting, such directors had adopted a resolution authorizing their president to apply for and receive on deposit any portion of the revenues of the State, and had authorized him to procure other persons to join with him in a bond to the State conditioned to account for and pay over the moneys so deposited; and, in pursuance of such resolution, the president had become personally liable, by a proper bond, to account and pay over, etc., and had procured others, not connected with the bank as officers or stockholders, to become jointly bound with him as obligors in such bond, and the bank had thereupon re-

ceived and used the moneys of the State: can there be any doubt that the bank would have been legally bound to indemnify and save harmless the obligors in such bond from loss or damage in consequence of their becoming parties to it? It seems to me not. And it seems equally clear that it would have been competent in such case for the bank, at any time after such bond had been given, to assign or transfer to the president, or to him and the other obligors so procured by and bound with him, any property or means in their power, sufficient for that purpose, to indemnify him or them against such bond, provided such assignment or transfer was not made in contemplation of insolvency. The same would be true, as it seems to me, if, instead of the president, with others not connected with the bank, becoming personally obligated, the directors had all united in a like personal obligation to secure the State, and had, at the same time, or afterwards, and while the bank was solvent, by resolution duly made, set apart in due form any of the assets or securities belonging to the bank, to a reasonable amount or value, for their indemnity against such personal liability. If provision could thus be made, through the action of a board of directors, for the security of depositors in a bank, and for indemnifying the sureties to such depositors, it is difficult to perceive why the same things might not be done by and through the agency of a president, clothed with powers equal to such as are possessed by a board of directors, especially in the case of a bank which has no board of directors. If the defendant, in the case at bar, had been obliged, in order to protect the other obligors in the bonds, to pay any portion of the moneys deposited by the State with the bank from his individual resources,

there could be no question of his right to take and retain, upon the first opportunity, from the cash funds of the bank sufficient to reimburse himself" (22 New York 523-524).

"I think it cannot be maintained that the plaintiff, under the facts found, is entitled to have the property in question conveyed to him, as receiver of the effects of the bank, without relieving the defendant from his liability on his bonds to the people and to the savings bank, if the bank itself would not be entitled to the same judgment, provided there had not been a receiver appointed, and on the supposition that it is now, and had always been, in successful operation as a banking association. All the transactions involved in the question under consideration took place before the failure of the bank, and at times when, for aught that appears, it was solvent and prosperous; and the receiver could acquire no claim or right, by virtue of his appointment, as against the defendant, which the association could not, at those times, have enforced against him. The defendant and his co-sureties had paid and were liable to pay, at the time of the trial, upon the three bonds to the people of this State, and the bond to the Western Savings Bank, over and above what they had received in dividends or otherwise, by way of reimbursement, an amount in the aggregate exceeding $48,000. The three parcels of real estate mentioned in the first three counts of the complaint and which is the property now in controversy, were worth, at the time of the trial, in the aggregate, the sum of $24,000. This property is all the defendant has to indemnify himself and his co-sureties for such payments and liabilities. The sureties in each of the bonds were procured by the defendant, as president and managing agent,

for the benefit of the bank; and the deposits could not have been obtained without giving security, etc. The co-sureties with the defendant became obligated with him at his request; and he is, therefore, bound to protect them. * * * It was lawful and proper that he and his co-sureties should have put into his or their hands, by the association, means for their protection and indemnity against the large liabilities which they incurred by the execution of the several bonds mentioned; and this could not be done except by the defendant's own action, as he was the only organ through and by which the association could transact that or any other business. The association have received the direct benefit of the several amounts of money to secure which the bonds were given, and the creditors have indirectly had the benefit of the same by the consequent increase of the assets of the association. The defendant acquired title in his own name to the several parcels of real estate, and continues to hold the same, for the purpose of securing himself and his co-sureties from and against their liability on the several bonds referred to. Upon these facts—all of which are either stated in the complaint or found by the judge before whom the cause was tried—a strong equity in favor of the defendant is presented. He has the legal estate in the lands in question, and the plaintiff comes with an appeal to the equitable powers of the court, and asks to have the defendant divested of such legal estate and have it vested in himself unconditionally for the benefit of the creditors of the association, which, with such creditors, have, directly and indirectly, enjoyed the fruits of the transactions out of which the claim of the plaintiff, their representative, arose.

"If this is equity, it must be by reason of the stern, unbending character and extended application of the principle before referred to. That principle, in its proper, just and equitable application, I am ready to stand by and enforce. But I do not believe it requires the sacrifice of substance to form, nor the prostration of plain and manifest justice, under the guise of equity or public policy" (22 New York 525-527).

"But I am not willing to rest my conclusion on the grounds just stated. No wrong has been done by the defendant. Neither the association nor its creditors have been injured by him. As heretofore remarked, he stood in the place of a board of directors, with all the powers which the shareholders were able to delegate to him, which were no less than all they themselves possessed, so far as respected the corporate transactions of the association. It was not only lawful for him to apply for and receive the moneys in question, but his duty to do so, if he supposed they could be used to advantage in the business of the association. These moneys could not be obtained without security beyond the corporate responsibility of the association. He was, then, bound to furnish such security, if in his power; and, in doing so, it was lawful for him to pledge the property of the association to indemnify the sureties. It would have been lawful, if the canal board and savings bank would have been satisfied with it, for him to have given his own individual bonds, without any other sureties, and to have taken a like pledge for his own individual indemnity. But he procured others to unite with him in the bonds. He had, therefore, a direct interest and a clear right to indemnify himself and his co-sureties, through the property and means of

the association, against his and their liabilities so incurred. * * * To secure indemnity against these liabilities was a duty the defendant owed, not only to himself, but pre-eminently to the sureties whom he had procured to be bound with him" (22 New York 528-529).

"*Comstock, Ch. J.* (concurring):

"The plaintiff in this case, representing, as receiver, no greater rights than the bank would have if it were a party to this controversy, demands from the defendant a conveyance of the titles acquired in the manner stated, and, in support of that demand, he invokes the doctrine that an agent or trustee cannot purchase, for his own benefit, an estate to which the agency or trust relates. The general doctrine is extremely familiar. * * * But when we come to take a more exact view of the actual circumstances of the case, I see no room for the application of the rule invoked or any of its analogies. * * * It appears that the defendant purchased the lands using the funds of the bank, and took the title to himself, with the intention of holding it for the indemnity of himself and others who had united with him in becoming security to the State, and to a savings bank in Buffalo, for moneys deposited with the institution. The finding at the trial is, that the defendant took title to the several parcels of land, claiming to hold them for that purpose. The transactions, in their real character, amounted, therefore, to an appropriation by the financial head of the bank of a certain portion of its funds and assets for the purpose of securing himself and his associates for the liabilities they had assumed. If he had a right to take a pledge for that purpose, it can make no difference in what

form he kept the value in pledge. He might keep the assets thus appropriated, or he might invest them in land. If the bank might complain of such investment as unauthorized or unwise and might, on that ground, charge him with a loss, if one should occur, this would furnish no reason for taking the value thus appropriated, out of his hands unconditionally, provided he had a right to secure himself and his associates by taking any pledge whatever. * * * The only question, then, is, whether he and his associates, in the liability which they had assumed, had a right to be secured by his act in the premises. And I think they had this right. It is in the usual line of business for a bank to take deposits. The State, as we know, requires security to be given, *and any other depositor may require it.* And if the president or cashier, being the general agent or manager, enters into the required bonds and procures others to unite with him, I see no reason why he may not, in good faith, take a counter security from the institution. He may be the actor in his official capacity, and, with others united in interest, he may also be the recipient in the transaction. What is fairly done for such a purpose should be allowed to stand. The result in this case will violate no rule of law while equity will be promoted" (22 New York 531-534).

The foregoing excerpts from the opinion in the Lansing case show the court based its decision upon the proposition that the power to pledge assets to procure deposits was a power incidental to the express power to receive deposits under section 18 of the New York

law, and when Congress adopted the language of that section it must have intended to confer a similar power upon national banks under the Act of 1864.

Petitioner is conversant with the opinion in *State Bank of Commerce of Brockport v. Stone, 184 N. E. 750,* but that decision, rendered 69 years after Congress adopted the New York law, cannot defeat the well-recognized principle of law that the construction placed upon an act, before its adoption, by the highest court of the state, is carried into that act when adopted by another legislative body.[1]

In the case at bar the railway company never agreed to place its moneys on deposit without security and from the opening of its account until January 29, 1931 they were secured by corporate surety bonds on which the bank paid the premiums. Unknown to the railway company, but known to the officers of the bank, one of the surety companies was threatening cancellation of its bond and it was extremely doubtful that another surety company could be procured to assume the risk. The bank wished to retain the railway company's deposits, amounting to an average daily balance of approximately $50,000, but knew they would be withdrawn if the surety bonds were canceled. To avoid this and obtain future deposits, the pledge of liberty bonds was given, and on the faith of that pledge additional deposits were

1 Panama R. Co. v. Rock, 266 U. S. 209, 212-213, 69 L. ed. 250.

made. Clearly the Court of Appeals of New York had this kind of a case in mind when writing its opinion in the Lansing case, and undoubtedly Congress had it in mind when adopting the New York law.

If there be any merit in respondent's arguments *in terrorem* all dangers can readily be eliminated by the passage of an amendatory act during the present session of Congress, which would not divest this Company of its property rights established upon the true meaning of the Act of 1864. In this connection we think pertinent the following excerpt from the opinion of the Court in *National Bank of Genesee v. Whitney, 103 U. S. 102, 26 L. ed. 444:*

> "Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubt as to their soundness. The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed. If there should be a change, the Legislature can make it with infinitely less derangement of the interests of the country than would follow a new ruling of the court, for statutory regulations would operate only in the future."

Second and Third Grounds

The deposits of the railway company which the receiver will distribute to general creditors were procured

by the bank as a result of the pledge agreement, and to permit such distribution of those deposits while refusing to enforce the pledge through which they were procured, is to enforce the rights of general creditors arising on a contract declared *ultra vires*, contrary to the announced doctrine of the Court that "no rights arise on an *ultra vires* contract, even though the contract has been performed".

To relegate the railway company to a mere action on an implied contract and to restrict its right to recovery to the status of other general creditors would not afford the relief to which it is entitled under the facts of this case. In such event the general creditors would receive the full benefit of the contract of deposit while the rights of the railway company under that agreement are denied. As stated by this Court in several decisions[1], the rule that a party may recover moneys parted with under an *ultra vires* contract was promulgated for the purpose of absolutely destroying such contract, which would not be the case if either party thereto were permitted to retain the benefits of it. This rule of course would be defeated under the present decision of the Court in those cases where insolvency has intervend even though it be shown that the actual benefits passed

1 Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24, 60, 35 L. ed. 55, 60; Pullman's Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 43 L. ed. 108; Aldrich v. Chemical National Bank, 176 U. S. 618, 44 L. ed. 611.

into the hands of the receiver and are about to be distributed by him to general creditors. If a party to an *ultra vires* contract is entitled to recover money with which it has parted as a result of such contract it certainly should be permitted to recover it from any person into whose hands it may have passed whether that person be a receiver or any other party acting in a fiduciary capacity.

Moreover, the circumstances under which the bank received the railway company's deposits, if the pledge agreement be invalid, give rise to a constructive trust. Unknown to the railway company but known to the officers of the bank, one of the real reasons for substituting a pledge of liberty bonds in lieu of corporate surety bonds was the threat of one of the surety companies to cancel its bond and the inability of the bank to procure another surety company to assume the risk. The bank's officers withheld this information from the railway company and predicated their request for the substitution solely upon the ground that the bank wished to save the bond premiums which it had been paying. This false representation in inducing the railway company to accept the pledge in lieu of the surety bonds, and to make further deposits on the faith of that pledge, was a circumstance of special misconduct and it is difficult to perceive how it can be held that deposits thereafter made by the railway company in reliance upon

such pledge agreement, now declared invalid, became general assets of the bank, subject to ratable distribution to general creditors in the event of insolvency. This is not a case like *Blakey v. Brinson, 286 U. S. 254, 76 L. ed. 1089.* The decision in that case rests squarely upon the proposition that no trust was created because the depositor by agreement became a general creditor of the bank and his deposits became general assets of the bank as a result of that agreement. In the case at bar the railway company never agreed to become a general creditor of the bank nor that its deposits should become general assets of the bank if they in fact were not secured; and, the pledge agreement being invalid, petitioner's deposits were held by the bank, and later by its receiver, as special deposits in trust for the railway company.

When the bank failed the railway company had $54,646.94 on deposit and when the receiver took charge there was $113,686.92[1] in actual cash in the bank's vaults, and there was due it from other banks in the United States, less overdrafts, the sum of $939,903.15[1]. It is certain that the bank's assets were increased by the railway company's deposits; it is also certain that

1 First report of Receiver S. O. Pottorff to the Comptroller of the Currency, Trust No. 1720, on file in the Comptroller's office.

there came into the possession of the receiver a sum of money greatly in excess of those deposits; and in order to do equity[2] an equitable lien should be fixed upon the property in the receiver's hands or the Court should permit the railway company to recover from the receiver, in petitioner's second action now pending in the District Court, the deposits which the receiver holds in trust, upon proof that those deposits came into his possession in their original or altered form.

Conclusion

Wherefore, petitioner respectfully prays that this petition for rehearing be granted; that the decree and judgment of the District Court and the Circuit Court of Appeals for the Fifth Circuit be reversed and the cause remanded with direction to grant the relief sought by petitioner; or, in the alternative, if those decrees and judgments be affirmed, that such action be without prejudice to petitioner's right to prosecute its second cause of action, now pending in the District Court, against the receiver to recover the deposits which he

2 Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24, 60, 35 L. ed. 55, 60; Pullman's Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 43 L. ed. 108; Aldrich v. Chemical National Bank, 176 U. S. 618, 44 L. ed. 611; Citizens' Central Natl. Bank v. Appleton, 216 U. S. 196, 54 L. ed. 443.

holds in trust or to fix an equitable lien upon the property in his possession.

Dated at Dallas, Texas, March 16, 1934.

Respectfully submitted,

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Certificate of Counsel

I, M. E. Clinton, of counsel for petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

(Signed) M. E. CLINTON,
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